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ABSTRACT

Designed to provide guidance for librarians, this publication expresses the opinion of the legal counsel of the American Library Association (ALA) regarding library and classroom use of copyrighted videotapes and computer programs. A discussion of videotapes considers the impact of the Copyright Revision Act of 1976 on in-classroom use, in-library use in public libraries, and loan and duplication of videotapes. Computer software concerns addressed include purchase conditions generally, avoiding license restrictions, loaning software, archival copies, and in-library and in-classroom use. Finally, 19 questions about the use of videotapes or computer software in the library or classroom are presented, and the appropriate response to each situation is provided. (KM)

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LIBRARY AND CLASSROOM USE OF COPYRIGHTED VIDEOTAPES AND COMPUTER SOFTWARE

By Mary Hutchings Reed and Debra Stanek

Mary Hutchings Reed is a partner in the law firm of Sidley & Austin, Chicago, and counsel to the American Library Association. Debra Stanek will graduate in June from the University of Chicago Law School.

After receiving numerous queries regarding library use of copyrighted videotapes and computer programs, I asked ALA attorney Mary Hutchings Reed to prepare a paper that would address the issues that librarians had brought to my attention and offer some guidance. The result is the following which we've published as an insert so that it can be removed and posted for ready access. A longer, more detailed article by Debra Stanek, "Videotapes, Computer Programs and the Library," will appear in the March 1986 issue of *Information Technology and Libraries*. These papers express the opinion of ALA's legal counsel; individuals and institutions deeply involved in copyright matters should consult their own attorneys. *Donna Kitta, Administrator, ALA Office of Copyright, Rights & Permissions*

I. VIDEOTAPES

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The Copyright Revision Act of 1976 clearly protects audiovisual works such as films and videotapes. The rights of copyright include the rights of reproduction, adaptation, distribution, public performance and display. All of these rights are subject, however, to "fair use," depending on the purpose of the use, the nature of the work, the amount of the work used and the effect the use has on the market for the copyrighted work.

Libraries purchase a wide range of educational and entertainment videotapes for in-library use and for lending to patrons. Since ownership of a physical object is different from ownership of the copyright therein, guidelines are necessary to define what libraries can do with the videotapes they own without infringing the copyrights they don't. If a particular use would be an infringement, permission can always be sought from the copyright owner.

A. In-classroom Use

In-classroom performance of a copyrighted videotape is permissible under the following conditions:

1. The performance must be by instructors (including guest lecturers) or by pupils; and
2. the performance is in connection with face-to-face teaching activities; and
3. the entire audience is involved in the teaching activity; and
4. the entire audience is in the same room or same general area;
5. the teaching activities are conducted by a non-profit education institution; and
6. the performance takes place in a classroom or similar place devoted to instruction, such as a school library, gym, auditorium or workshop;
7. the videotape is lawfully made; the person responsible had no reason to believe that the videotape was unlawfully made.

B. In-library Use in Public Libraries

1. Most performances of a videotape in a public room as part of an entertainment or cultural program, whether a fee is charged or not, would be infringing and a performance license is required from the copyright owner.
2. To the extent a videotape is used in an educational program conducted in a library's public room, the performance will not be infringing if the requirements for classroom use are met (See I.A.).
3. Libraries which allow groups to use or rent their public meeting rooms should, as part of their rental agreement, require the group to warrant that it will secure all necessary performance licenses and indemnify the library for any failure on their part to do so.
4. If patrons are allowed to view videotapes on library-owned equipment, they should be limited to private performances, i.e. one person, or no more than one family, at a time.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Donna Kitt

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

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5. User charges for private viewings should be nominal and directly related to the cost of maintenance of the videotape.
6. Even if a videotape is labelled "For Home Use Only," private viewing in the library should be considered to be authorized by the vendor's sale to the library with imputed knowledge of the library's intended use of the videotape.
7. Notices may be posted on videorecorders or players used in the library to educate and warn patrons about the existence of the copyright laws, such as: MANY VIDEOTAPED MATERIALS ARE PROTECTED BY COPYRIGHT. 17 U.S.C. § 101. UNAUTHORIZED COPYING MAY BE PROHIBITED BY LAW.

C. Loan of Videotapes

1. Videotapes labelled "For Home Use Only" may be loaned to patrons for their personal use. They should not knowingly be loaned to groups for public performances.
2. Copyright notice as it appears on the label of a videotape should not be obscured.
3. Nominal user fees may be charged.
4. If a patron inquires about a planned performance of a videotape, he or she should be informed that only private uses of it are lawful.
5. Videorecorders may be loaned to a patron without fear of liability even if the patron uses the recorder to infringe a copyright. However, it may be a good idea to post notices on equipment which may be used for copying (even if an additional machine would be required) to assist copyright owners in preventing unauthorized reproduction. (See I.B.7)

D. Duplication of Videotapes

1. Under limited circumstances libraries may dupe a videotape or a part thereof, but the rules of § 108 of the Copyright Revision Act of 1976 which librarians routinely utilize with respect to photocopying, apply to the reproduction.

II. COMPUTER SOFTWARE

A. Purchase Conditions Generally

Most computer software purports to be licensed rather than sold. Frequently the package containing the software is wrapped in clear plastic through which legends similar to the following appear:

> You should carefully read the following terms and conditions before opening this diskette package. Opening this diskette package indicates your acceptance of these terms and conditions. If you do not agree with them you should promptly return the package unopened and your money will be refunded.
>
> OR
>
> Read this agreement carefully. Use of this product constitutes your acceptance of the terms and conditions of this agreement.
>
> OR
>
> This program is licensed on the condition that you agree to the terms and conditions of this license agreement. If you do not agree to them, return the package with the diskette still sealed and your purchase price will be refunded. Opening this diskette package indicates your acceptance of these terms and conditions.

While there is at present no caselaw concerning the validity of such agreements (which are unilaterally imposed by producers), in the absence of authority to the contrary, one should assume that such licenses are in fact binding contracts. Therefore by opening and using the software the library or classroom may become contractually bound by the terms of the agreement wholly apart from the rights granted the copyright owner under the copyright laws.

Following such legends are the terms and conditions of the license agreement. The terms vary greatly between software producers and sometimes between programs produced by the same producer. Many explicitly prohibit rental or lending; some limit the program to use on one identified computer or to one user's personal use.

B. Avoiding License Restrictions

Loans of software may violate the standard license terms imposed by the copyright owner. To avoid the inconsistencies between sale to a library and the standard license restriction, libraries should note on their purchase orders the intended use of software meant to circulate. Such a legend should read:

PURCHASE IS ORDERED FOR LIBRARY CIRCULATION AND PATRON USE.

Then, if the order is filled, the library is in a good position to argue that its terms, rather than the standard license restrictions, apply.

C. Loaning Software

1. Copyright notice placed on a software label should not be obscured.
2. License terms, if any, should be circulated with the software package.
3. An additional notice may be added by the library to assist copyright owners in preventing theft. It might read: SOFTWARE PROTECTED BY COPYRIGHT, 17 U.S.C. § 101. UNAUTHORIZED COPYING IS PROHIBITED BY LAW.
4. Libraries generally will not be liable for infringement committed by borrowers.

D. Archival Copies

1. Libraries may lawfully make one archival copy of a copyrighted program under the following conditions
   a) one copy is made;
   b) the archival copy is stored;
   c) if possession of the original ceases to be lawful, the archival copy must be destroyed or transferred along with the original program;
   d) copyright notice should appear on the copy.
2. The original may be kept for archival purposes and the "archival copy" circulated. Only one copy — either the original or the archival — may be used or circulated at any given time.
3. If the circulating copy is destroyed, another "archival" copy may be made.
4. If the circulating copy is stolen, the copyright owner should be consulted before circulating or using the "archival" copy.

E. In-library and In-classroom Use

1. License restrictions, if any, should be observed.
2. If only one program is owned under license, ordinarily it may only be used on one machine at a time.
3. Most licenses do not permit a single program to be loaded into a computer which can be accessed by several different terminals or into several computers for simultaneous use.
4. If the machine is capable of being used by a patron to make a copy of a program, a warning should be posted on the machine, such as: MANY COMPUTER PROGRAMS ARE PROTECTED BY COPYRIGHT, 17 U.S.C. § 101. UNAUTHORIZED COPYING MAY BE PROHIBITED BY LAW.

III. EXAMPLES

1. A high school English teacher wants to show a videotape of the film "The Grapes of Wrath" to her class. The videotape has a label which says "Home Use Only".

As long as the § 110 (1) requirements for the classroom exception apply, the class may watch the videotape.

2. Same situation as 1, but 4 classes are studying the book, may the videotape be shown in the school auditorium or gym?

Yes, as long as the auditorium and gym are actually used as classrooms for systematic instructional activities.

3. Several students miss the performance, may they watch the videotape at some other time in the school library?

Yes, if the library is actually used for systematic instructional activities the classroom exception applies. Most school libraries are probably used as such. If it is not, such a performance may be a fair use if the viewing is in a private place in the library.

4. May several students go to the public library and borrow the videotape to watch it at home?

Yes, the library may lend the videotape for in-home viewing by a student and a small group of friends.

5. May the student go to the public library and watch the videotape in a private room?

This normally would not be permitted because more than one person would be watching the videotape. However such a use probably would be fair under § 107 because of its relationship to the classroom activities.

6. May an elementary school teacher show a videotape of the film "Star Wars" to his or her class on the last day of school?

Because a classroom is a place where a substantial number of persons outside of a family and friends are gathered, performances in them are public. Assuming that this performance is for entertainment rather than with systematic instruction, the classroom exception would not apply. It is unlikely that such a public performance would be a fair use.

7. A book discussion group meets in a classroom at the high school. May they watch a videotape of "The Grapes of Wrath"?

No, the discussion group is not made up of class members enrolled in a non-profit institution, nor is it engaged in instructional activities, therefore the classroom exception would not apply. Any such performance would be an infringing public performance because it is a place where a group of persons larger than a family and its social acquaintances are gathered. Permission of the copyright owner should be sought.

8. Same as 7, but the group meets at a public library.

The performance may be infringing because the library is open to the public and the audience would be a group larger than a family and friends outside of a non-profit instructional program.

9. A patron asks if he can charge his friends admission to watch videotapes at his home.

The library's duty in this situation is merely to state that the videotape is subject to the copyright laws. In fact, as long as the patron shows the videotape at home to family or social acquaintances the performance would not be a public one, and therefore not infringing even if they share the cost of the videotape rental.

10. A patron asks if he can charge admission to the general public and show the videotape at a public place.

The duty is the same as in the previous situation; however, the proposed use is an infringement of copyright.

11. A librarian learns that a patron is borrowing videotapes and using them for public performances.

Again, there is a duty to notify the patron that the material is subject to the copyright laws. There is room for a variety of approaches to this situation, but there is no legal reason to treat videotapes differently from any other copyrighted materials which are capable of performance. While there is no clear duty to refuse to lend, there is a point at which a library's continued lending with actual knowledge of infringement could possibly result in liability for contributory infringement.

12. A book about the Apple IIe computer contains a diskette with a program for the computer. May the software be loaned with the book?

If the software is not subject to a license agreement it may be freely loaned like any other copyrighted work. If it is licensed, the agreement may or may not prohibit lending. A careful reading of the license is in order. If the license appears to prohibit any ordinary library uses the software producer should be contacted, and the agreement amended in writing. If this is not possible, the library should be able to return the package for a refund, as the seller, by selling to a library, may be on notice of ordinary library uses.

13. A math teacher uses one diskette to load a computer program into several terminals for use by students.

This use would violate copyright laws as well as most license agreements. It violates § 117 of the Copyright Act, which authorizes the making of *one* copy if necessary in order to use the program, because it creates copies of the program in several terminals. Further, many license agreements prohibit use of the software on more than one terminal at a time, as well as prohibiting networking or any system which enables more than one person to use the software at a time.

14. A math teacher puts a copy of "Visicalc" on reserve in the school library. The disk bears no copyright notice. May the library circulate it?

The disk ought to bear the copyright notice, but whether it is the library's legal duty to require one or to affix it is unclear. Individual library reserve policies may govern this situation — it's probably a good idea to require that the appropriate notices be affixed prior to putting the copy on reserve. Further, the lack of copyright notices may put the library on notice that this is a copy rather than the original program. If the original is retained by the teacher as an archival copy (i.e., not used) there is no problem. If not, then the reserve copy is an unauthorized copy and its use would violate the copyright laws and most license agreements. While the library might not be legally liable in this situation it would be wise to establish a policy for placing materials on reserve which prevents this.

15. May the library make an archival copy of the "Visicalc" program on its reserve shelf?

Usually yes. Section 117 permits the owner of the software to make or authorize the making of one archival copy. If the teacher who put the program on reserve has not made one, she or he may permit the library to do so. Remember, most license agreements and the copyright laws permit the making of *one* archival copy.

16. Same as 15, except the reserve copy is damaged. May the library make another copy (assuming it has the archival copy) for circulation?

Yes, the purpose of an archival copy is for use as a back-up in case of damage or destruction. The library may then make another archival copy to store while circulating the other.

17. Same as 16, except the reserve copy is stolen.

Perhaps. It is not clear whether the purpose of a back-up copy includes replacement in the event of theft but arguably it does. However, § 108 (c) permits reproduction of audiovisual works (which includes many computer programs) in the event of damage, loss, or theft *only* if a replacement may not be obtained at a fair price. Further, some license agreements require that archival copies be destroyed when possession (not ownership) of the original ceases. Therefore a replacement copy may need to be purchased. A safe course is to consult the software vendor.

18. When the teacher retrieves his or her copy of the program may the library retain the archival copy?

No. When possession of the original ceases, the archival copy must be transferred with the original or destroyed. If it is returned with the original, the teacher would not be permitted to make additional copies — he or she would have an original and the archival copy. Most license agreements contain similar provisions.

19. A librarian learns that a patron is copying copyrighted software on the library's public access computers.

There is a duty to notify the patron that the software is subject to the copyright laws. The computers should have notices similar to those on unrupervised photocopiers.